

MINUTES

Advisory Committee on Model Civil Jury Instructions

March 12, 2018

4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Honorable James T. Blanch, chair of the Model Criminal Jury Instructions Committee, and Keisa Williams of that committee

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Von Maack, the committee approved the minutes of the February 12, 2018 meeting.

2. *Schedule.* The committee will continue its review of the Civil Rights instructions in April and will also review the Assault and False Arrest instructions. Mr. Fowler noted that the products liability instructions need to be updated. Mr. Von Maack said that the subcommittee Directors and Officers Liability did not think there was a need for a separate section on Directors and Officers Liability. Most claims are covered by statute or other business torts. Ms. Sylvester thought that the same may be true of the Wills/Probate instructions as well. The committee will replace the Directors and Officers Liability instructions on the schedule with revised Products Liability instructions.

3. *Uniformity of the Model Utah Jury Instructions.* Judge Stone noted that the tasks of the civil instructions committee and the criminal instructions committee were essentially the same--to come up with clear, understandable instructions that accurately state the law. The instructions are not the final word on the topics they cover, nor are they a safe harbor for courts and practitioners, but they provide a reasonably solid starting point for courts to instruct juries and avoid the problem of having to come up with a new set of instructions for every case. Uniformity between the two sets of instructions increases the likelihood that they will be accepted and used, particularly by judges who try both types of cases. Some judges are still not using the model instructions but prefer their own stock instructions. Judge Blanch indicated that the criminal committee had initially just set out to update the civil instruction on electronic devices, which referred to Blackberries and MySpace. They later also updated some of the other general instructions and added an instruction to anticipate common questions, such as, Can we have a copy of the police report? Judge Blanch indicated that he thought the general criminal instructions were good. Because so many criminal jury trials get appealed, he thought that any problems in the instructions would have been identified by now by the appellate courts. Judge Stone thought it made sense to have staff compare the general criminal and civil instructions and point out the differences between them and then see if one committee wanted to adopt the other committee's instructions on particular matters. Judge Kelly noted, for example, that he preferred

CR101 to CV101. Ms. Sylvester volunteered to do the comparison. The committee will then decide what changes, if any, to make to the civil general instructions.

Dr. Di Paolo joined the meeting. Judge Blanch and Ms. Williams were excused.

4. *CV1609, Non-actionable Statements* (defamation) and *CV1909, Non-actionable Statements* (injurious falsehood). After the last meeting, Mr. Reymann revised CV1609 to conform with the committee's changes to CV1909. Dr. Di Paolo questioned whether the court needs to explain the "other purposes" for which the non-actionable statements may have been admitted. Ms. Shurman noted that the committee had considered and rejected that approach, deciding to leave the issue for argument rather than having the court instruct, for example, that the jury may consider the statement as evidence of malice, which the jury may think implies that there was malice. Dr. Di Paolo noted that just repeating the statements gives them greater importance in the minds of jurors. Judge Kelly noted that he tries not to give the jury written statements because putting the statement in writing, as in a jury instruction, may appear to give the court's seal of approval to the statement. Mr. Simmons moved to approve CV1609. Ms. Shurman and Ms. Shapiro seconded the motion, which passed without opposition.

5. *CV1605, Definition: False Statement* (defamation) and *CV1905, Definition: False Statement* (injurious falsehood). The committee then revisited the question of "literally" as used in CV1605 and CV1905. Judge Kelly noted that he had voted to follow the committee's approval of CV1905 at the last meeting because it tracked language from the Utah Supreme Court, but he was still not comfortable with the phrase "literally true." Dr. Di Paolo agreed, noting that there was no reason to use "literally." The instructions already say that the statement does not have to be "absolutely" or "totally" true. She noted that intensifiers such as "literally," "absolutely," and "totally" tend to lose their meanings over time. The committee revised the instructions by taking out the sentence "'Truth' does not require that the statement be absolutely, totally, or literally true." and replacing it with "To be considered 'true' in a [defamation/injurious falsehood] case, a statement need not be completely accurate." On motion of Judge Kelly, seconded by Messrs. Simmons and Von Maack, the committee approved this change to the instructions. Judge Stone questioned whether a true statement can be defamatory if it implies a defamatory falsehood. He noted that this is the case in a claim for "false light" invasion of privacy and asked whether we need instructions on invasion of privacy.

6. *Next meeting.* The next meeting is Monday, April 9, 2018, at 4:00 p.m.

The meeting adjourned at 5:15 p.m.